

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of) MM Docket No. 93-205
)
Amendment of Section 73.202(b),) RM-8270
Table of Allotments,)
FM Broadcast Stations,)
(Donalsonville, Georgia))

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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OFFICE OF THE SECRETARY

**REPLY TO CONSOLIDATED OPPOSITION TO
PETITIONS FOR RECONSIDERATION**

Marshall W. Rowland, Sr. ("Rowland"), by and through counsel, and pursuant to §1.429(g) of the Commission's Rules (47 C.F.R. §1.429), hereby submits his Reply to the "Consolidated Opposition To Petitions For Reconsideration" filed by Albany Radio, Inc. ("ARI")¹ in the above-captioned proceeding.² In support whereof, the following is shown:

Background

1. As fully set out in Rowland's Petition For Reconsideration and Motion For Stay filed in this proceeding,³ the Commission's ultimate allotment of Channel

¹ ARI is the successor-in-interest to EME Communications ("EME").

² This Opposition is timely-filed. ARI filed its Opposition on April 4, 1994, and pursuant to §1.4 and §1.429(g) of the rules, Rowland's Reply is due within 10 days (plus three days for mailing time) or April 19, 1994.

³ ARI has not opposed Rowland's "Motion For Stay" filed simultaneously with his Petition For Reconsideration.

271A at Donalsonville, Georgia, was a direct result of representations made to the Commission by Clyde Scott, an EME and former ARI principal. It was Scott that incorrectly stated to the Commission that the allotment of Channel 298A at Donalsonville would eliminate all fully-spaced transmitter locations for the new FM station at Sasser, Georgia, on Channel 299C3, as proposed in MM Docket No. 90-475. As Rowland has shown, but for Scott's representations, the Commission would not have made an alternate allotment at Donalsonville and it could have allotted channel 298A as originally proposed. Rowland also demonstrated that, by allotting an alternate channel to Donalsonville, for which there are no available, fully-spaced transmitter sites, the Commission has made an allotment in direct violation of its own rulemaking policies.

Scott's Alleged Misstatements

2. ARI now attempts to explain its predicament. With respect to Scott's statement to the Commission that there were no fully-spaced sites to accommodate a new FM proposal at Sasser, ARI argues that Scott only checked sites that were within Scott's self-devised "clear area." ARI claims that Rowland's site was slightly outside of Scott's self-devised "clear area" and that Scott failed to take into account the "metric rounding" provisions found in the Commission's technical rules. While this may be the case, the fact remains unchanged - contrary to Scott's mistaken belief, a fully-spaced transmitter site for Sasser did exist; and, had the Commission been aware of this fact, it would have allotted Channel 298A, as originally proposed, and not an alternate channel. Therefore, while Scott may

have merely overlooked the Rowland site and mistakenly forgot to consider metric rounding, the net effect was the same - the Commission was not presented with the true facts in this case and was unable to make the proper decision. Therefore, Scott's explanations do not change the final outcome in this proceeding - the Commission made an unnecessary alternate allotment at Donalsonville and should have simply allotted Channel 298A as originally proposed.⁴

The Allotment of Channel 271A to Donalsonville

3. Rowland's Petition For Reconsideration (§§7-9) shows that the Commission made an alternate allotment that it should never have considered. In lieu of Channel 298A at Donalsonville, the Commission allotted Channel 271A. However, in an engineering study attached to his Petition For Reconsideration, Rowland demonstrated that, because of spacing constraints, there would be only a very small open area to locate a fully-spaced transmitter site for Channel 271A at Donalsonville. Rowland verified that the owners of the land located within this small open area were not interested in selling or leasing their land for use as a transmitter site.

4. In response, ARI states that it has found a site that could be used in an application for Channel 271A. However, ARI admits that this site is short-spaced

⁴ In his Technical Exhibit, Scott launches into ad hominem attacks against Rowland. Such statements are completely unwarranted and serve no other purpose than to attempt to distract the Commission from the real issues at hand. The allegations contained in Rowland's pleadings were supported by the facts, and Scott's mean-spirited invective is nothing more than evidence of his frustration. After all, it was Scott's admitted failure to check land owners outside his "clear area" that lead to his incorrect statements to the FCC.

to other proposals and the only way an application could be filed proposing this site would be for the applicant to propose contour protection/terrain consideration pursuant to §73.215 of the rules.⁵ However, the Commission will not allot a new FM channel unless it is first shown that there exists at least one fully-spaced transmitter site, without reliance on §73.215. See, FM Modifications By Application (NPRM), 7 FCC Rcd 4943 (1992). The Commission demands strict adherence to its spacing requirements at the rulemaking stage. See, Chester and Wedgefield, South Carolina, 5 FCC Rcd 5572 (1990). Therefore, even if a party can show that there is a site that would permit a later application filing utilizing contour protection under §73.215, this will not satisfy the Commission's requirements at the initial rulemaking stage. See, FM Modifications (NPRM), supra.

5. In this case, the Commission made an allotment for which there are presently no available fully-spaced transmitter sites. The fact that ARI may have found a short-spaced transmitter site for Channel 271A is irrelevant here. As shown above, the allotment of Channel 271A was unnecessary, and can easily be corrected by allotting Channel 298A to Donalsonville, as originally proposed.

⁵ At several points in its Opposition, ARI refers to this site as "fully-spaced." See, for example, Opposition at pp. 3 and 4. However, this description is misleading, for the site is only "fully-spaced" if the contour protection provisions of §73.215 are employed. In the Technical Exhibit attached to its Opposition, ARI admits that this proposed site is: "1.4 KM short to a Construction Permit issued to WWSG at Sylvester, Georgia. Under the Commissions [sic] rules as stated in CFR 73.215....this site clears WWSG by 1.9 km using the contour protection/terrain consideration provisions." ARI's Opposition at Technical Exhibit, p. 2.

Rowland's Interest

6. ARI claims that Rowland has not shown the requisite "interest" to support his filing of a Petition For Reconsideration in this proceeding. To the contrary, Rowland has clearly shown that the ultimate outcome of this proceeding will have a direct effect on the Sasser, Georgia, proceeding, where both Rowland and ARI have pending applications. Whether the Commission decides to reverse its Report and Order in this proceeding will determine whether ARI's Sasser application will be dismissed as technically defective, or whether ARI's application will continue to be processed. Such an action could force Rowland to expend additional resources and to needlessly prosecute his application against ARI's mutually-exclusive application, and require the Commission to waste valuable resources on a comparative proceeding. Therefore, Rowland's interest in this proceeding is clear.

Conclusion

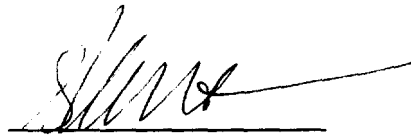
7. ARI's Opposition has provided nothing to persuade the Commission to change the ultimate outcome in this proceeding. There was no need for the Commission to allot an alternate channel to Donalsonville, when, as Rowland has shown, both the Donalsonville Channel 298A allotment and the Sasser 299C3 allotment can be made without any interference to each other. Furthermore, the Commission's decision to allot Channel 271A was made in contravention of its own policy. The solution is for the Commission to reverse its Report and Order and allot Channel 298A to Donalsonville.

WHEREFORE, the above-facts considered, Marshall W. Rowland, Sr., hereby respectfully requests that the Commission **RECONSIDER** its action in its Report and Order, 8 FCC Rcd 8506 (1993), and allot Channel 298A at Donalsonville, Georgia, as that community's second FM service.

Respectfully submitted,

MARSHALL W. ROWLAND, SR.

By:



Gary S. Smithwick
Shaun A. Maher

His Attorneys

SMITHWICK & BELENDIUK, P.C.
1990 M Street, N.W.
Suite 510
Washington, DC 20036
(202) 785-2800

April 19, 1994

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CERTIFICATE OF SERVICE

I, Lori Paige DiLullo, a secretary in the law firm of Smithwick & Belendiuk, P.C., certify that on this 19th day of April, 1994, copies of the foregoing were mailed via first class mail, postage pre-paid, to the following:

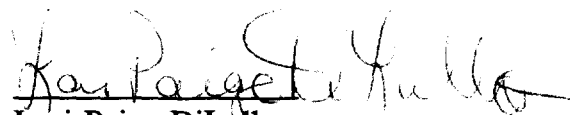
Ms. Victoria M. McCauley (*)
Assistant Chief - Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 8316
Washington, D.C. 20554

Ms. Nancy Walls (*)
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 8317
Washington, D.C. 20554

Jerry E. White
Seminole-Decatur Radio Company
Route 3, Box 514
Pelham, Georgia 31779

John S. Neely, Esq.
Miller & Miller, P.C.
P.O. Box 33003
Washington, DC 20033
Counsel for Albany Radio, Inc. and EME Communications

(*): By Hand Delivery


Lori Paige DiLullo